

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To Be Argued by Bennett M. Epstein, Esq.

76-1296-97

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

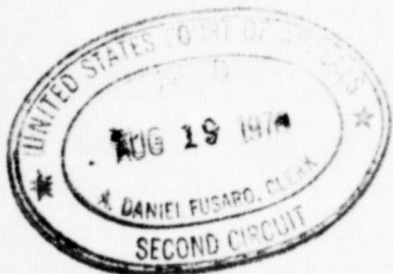
-against-

HAROLD ROSENBERG,

Appellant.

On Appeal from the United States District
Court for the Southern District of New York

BRIEF IN BEHALF OF APPELLANT



EVSEROFF & SONENSHINE
Attorneys for Appellant
186 Joralemon Street
Brooklyn, New York 11201
Tel. No. (212) 855-1111

WILLIAM SONENSHINE, ESQ.
Of Counsel

TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT.....	1
THE EVIDENCE.....	2
POINT ONE	
The evidence adduced against appellant Rosenberg was in- sufficient as a matter of law to establish his guilt beyond a reasonable doubt.....	10
POINT TWO	
It was error for the court to deny appellant Rosenberg's motion for a severance.	14
POINT THREE	
Appellant Rosenberg adopts the points raised by appellant Heimerle insofar as they are applicable.....	16
CONCLUSION.....	16

TABLE OF CASES CITED	PAGE
Benaguro v. United States, 400 U. S. 829, 91, S. Ct. 57.....	12
Glasser v. United States 315 U. S. 60, 80, S. Ct. 457.....	12
Heike v. United States, 227, U. S. 131, 33 S. Ct. 226.....	14
Ingram v. United States, 360 U. S. 679, 79 S. Ct. 1314....	11
Opper v. United States, 345 U. S. 84, 75 S. Ct. 158.....	15
Stilson v. United States, 250 U. S. 583, 40 S. Ct. 28.....	14
United States v. Arcuri, 405 F.2d 691 (2d Circ. 1968)....	12
United States v. Ball, 163, U. S. 662, 165 S. Ct. 1192.....	14
United States v. Dono, 428 F.2d 204 (2d Circ. 1970), cert. denied sub nom.....	12
United States v. Forzano, 190 F. 2d 687, 688(2d. Circ. 1951)	11
United States v. Lacey, 459 F. 2d 86 (2d Circ. 1951).....	11

PRELIMINARY
STATEMENT

Harold Rosenberg appeals from a judgment of conviction entered against him on June 25, 1976, after a jury trial before the Honorable Charles M. Metzner, in the United States District Court Southern District of New York.

The appellant, was charged in an indictment with one count of Conspiracy to transfer counterfeit United States obligations and one count of transferring said obligations, while the co-defendant, Heimerle was charged with three counts of transferring the obligations.

After a jury trial, the appellant was found guilty of both counts that he was charged with, while his co-defendant was found guilty of all counts.

The appellant was sentenced on June 25, 1976 to a term of imprisonment of one year on each count, to run concurrently.

THE EVIDENCE

THE GOVERNMENT'S CASE

FRANCIS McDONNELL testified that he was a Special Agent of the United States Secret Service. On January 28, 1976 an informant named Julian Mitchell introduced him as a "stock and bond guy from Philadelphia" to the defendant James Heimerle outside Joyce's Pub, 50th Street and Second Avenue, Manhattan. As the three of them circled the block in Heimerle's 1970 Pontiac, Heimerle handed Mitchell a package which McDonnell examined and found to contain fifty counterfeit \$100 Federal Reserve Notes (Gov't Exh. 4). Before they parted, Heimerle agreed to get McDonnell a \$5000 package of the money to "move" in Philadelphia and a sample counterfeit Treasury Bill and to arrange to meet again through Mitchell. (9-14;

A 1-6)*

McDonnell testified further that on February 2, 1976 at about 1:30 P. M., Heimerle sold him 50 counterfeit \$100 Federal Reserve Notes, (Gov't Exh. 6) for \$600 in marked money as they circled Joyce's Pub in Heimerle's car. McDonnell ordered another \$125,000 in the notes and asked about the Treasury Bill and they again arranged to contact each other through Mitchell (16-17; A 7-8).

McDonnell testified that he next met Heimerle at approximately 1:30 P. M. on February 5, 1976 at Joyce's Pub. On this occasion he introduced Heimerle to Special Agent Jane Bisacquino as his girlfriend, Janie. The two men left the bar and drove around the block in Heimerle's car.

*References prefixed "A" refer to Appellant Rosenberg's Appendix. Unprefixed references refer to pagination in the full typewritten transcript of the trial.

Heimerle told him to forget about the Treasure Bill for now and that he would have to contact his people that evening for the package of counterfeit notes. He gave McDonnell the numbers of two coin box telephones and told him to call either on at exactly midnight (21-23; A 9-11).

McDonnell testified further that he called one of the numbers at midnight and Heimerle answered. He said he was having some difficulty coming up with the \$125,000 and McDonnell agreed to accept \$35,000 worth that same night. They agreed to meet at the Brasserie Restaurant on 51st Street between Lexington and and Park Avenues. It was snowing that night and Heimerle said it would take him at least a couple of hours to pick it up and get to the restaurant (23-25; A 11-13).

McDonnell testified that he and Bisacquino met Heimerle at the restaurant at about 2 A.M. Heimerle excluded Bisacquino and the two men drove in Heimerle's car to the Ramada Inn at 47th Street and 8th Avenue. They went to the 10th floor of the hotel and Heimerle knocked on the door to room 1026 but there was no answer. They went back to the lobby and Heimerle asked for room 1026 on the house phone. Then he spoke to someone on the phone and said "I am down in the lobby. I want you to bring the package downstairs. I will be out in front of the motel" (26-28; A 14-16).

McDonnell testified that he and Heimerle went back and sat in the automobile. About five minutes later, the defendant Harold Rosenberg

handed Heimerle a package through the car window and asked him if he had gotten the money yet. Heimerle only replied that he would "be back in 15 or 20 minutes". McDonnell looked into the package, which contained \$32,600 in counterfeit notes tightly-wrapped in \$100 wrappers (Gov't Exh. 8). They drove back to the restaurant where "Jaine" was supposed to be holding the money and Heimerle was arrested. McDonnell then drove back to the Ramada Inn with other agents and identified the defendant Rosenberg for them as the man who had come to the car (28-35; A 16 - 23).

On cross-examination, McDonnell testified that up until the Ramada Inn episode he had never seen Rosenberg, nor had Heimerle ever mentioned him. When the person he identified as Rosenberg came to the car window that morning, it was snowing and no lights were on in the automobile (41-42, 45; A 24-25-26).

McDonnell further testified that Julian Mitchell, the informant, had been arrested by the Secret Service and was working for them to alleviate any penalty he might face for his crime. McDonnell was not present when Mitchell set up the meetings with Heimerle. He did not know what inducement Mitchell made to have Heimerle present (51, 63-66; 27, 28-31).

SAMUEL ZOMA testified that he was a Special Agent of the Secret Service and observed the meetings of January 28th and February 2d between Heimerle and McDonnell at Joyce's Pub (77-84; A 32 - 34).

JAMES GILMARTIN testified that he was a Special Agent of the

Secret Service. He observed the events of January 28th and February 2nd at Joyce's Pub and took photographs of the latter meeting (Gov't Exh. 7) (84-93; A 39-48).

TERRY HOWARD CHODASH testified that he was a Special Agent of the Secret Service and was the arresting officer of Julian Mitchell. Mitchell was arrested for possession of counterfeit money and is currently under indictment in the Southern District of New York. He was told only that his cooperation would be brought to the attention of the Assistant United States Attorney handling his case and the sentencing judge. (103-104; A 49-50).

JANE BISACQUINO testified that she was a Special Agent of the United States Secret Service and was present with agent McDonnell on February 5th and 6th as per his testimony. After Heimerle's arrest she went to the Ramada Inn and participated in the arrest of the defendant Rosenberg in Room 1026, which was then searched (117- 124; A 51-58).

On cross-examination, Bisacquino testified that no counterfeit money was found in the room (124; A 58).

GEORGE P. HEMMER, JR., testified that he was a Special Agent of the United States Secret Service. During the late evening and early morning hours of February 5th and 6th, 1976 he had two telephone coin boxes outside a Pathmark Supermarket on Cropsey Avenue in Brooklyn under surveillance, and observed Heimerle drive up and answer one of the telephones at approximately midnight (125-127; A 59-61).

JOHN FLYNN testified that he was night manager of the Ramada Inn on 8th Avenue on February 5, and 6 of 1976. He identified the defendant Rosenberg as having filled out a registration card for room 1026 at 1:59 A.M. on February 6, 1976 without luggage under the name Henry Reagan, 1712 Collins Avenue, Boston (Gov't. Exh. 13). (135-138; A 62 - 65).

On cross-examination, Flynn testified that it was not unusual for the hotel to have guests check in without luggage. The only times he saw the defendant Rosenberg that night were when he registered and when the agents brought him out under arrest (139-140; A 66 - 67).

ANTE ANTOLOS testified that he was a bellhop on the midnight to 8 A.M. shift at the Ramada Inn on February 6, 1976 and that he let the defendant Rosenberg into room 1026 that night although Rosenberg indicated he wanted to go up by himself. Thereafter he saw Rosenberg outside the front door talking with somebody in a car (143-144; A 68, 69).

JAMES EDWARD HEAVY testified that he was a Special Agent of the United States Secret Service. He compared a genuine \$100 Federal Reserve Note found on the person of Heimerle, upon his arrest, on February 6, 1976 (Govt. Exh. 1; 1A [xerox copy]) with a list of the bills used by Agent McDonnell to purchase counterfeit notes on January 28, 1976 (Govt. Exh. 2) and concluded that the bill was part of the marked money (152-156; A 70 - 74).

Heavy testified further that he had received training in counterfeit detection and Government Exhibits 4, 6 and 8 are counterfeit (157-158; A 75-76).

On cross-examination, Heavey testified that Julian Mitchell was arrested for possession of similar counterfeit \$100 bills to those in evidence.

THE DEFENDANT HEIMERLE'S CASE

JAMES HEIMERLE, the defendant, testified that he was 38 years old and reared with his parents. He had been convicted for possession of stolen airline tickets and counterfeiting in 1972 and was released from prison December 24, 1975. He first met Julian Mitchell in 1971. Around Christmastime of 1975, Mitchell left a message with a friend for Heimerle to call him at the Edison Hotel and they spoke there that evening about money Mitchell owed Heimerle.

Heimerle further testified that a few days later they met again and Mitchell gave him \$200. On January 28, they met in Heimerle's car outside Joyce's Pub and Mitchell told him to let McDonnell in the car with them. In the car, Mitchell handed McDonnell an envelope and McDonnell handed Mitchell some money, which Mitchell turned over to Heimerle. Thereafter, Heimerle met with Mitchell at the Bonanza Restaurant and asked him for money. Mitchell said he "had something going with this guy Frank" [McDonnell], and Heimerle might get his money from the deal. (178-190; A 80- 93).

Heimerle also confided that on February 2nd he went to meet Mitchell but McDonnell was there instead. As they drove around the block, McDonnell

wanted to know why Mitchell owed Heimerle money. No money was exchanged between them that day (192-193; A 94-95). Again on February 5th, Mitchell set up a meeting with Heimerle but when Heimerle arrived he found only McDonnell present. McDonnell wanted to contact Mitchell so Heimerle, knowing he would be in touch with Mitchell that day, told McDonnell to call him at the number outside the Pathmark Supermarket because his father was very sick and got annoyed when the phone rang. That day, Mitchell gave him a package to give to McDonnell, and he did so that night, after which he was arrested (194-195; A 96-97).

Heimerle testified that upon his arrest he was taken to Secret Service Headquarters, where the agents offered to let him go if he told them who "Tony" was (196; A 98).

On cross-examination, Heimerle testified that after he spoke with McDonnell on the telephone he had about two hours to kill so he went to a bar on Surf Avenue in Brooklyn. There he met the defendant Rosenberg, whom he knew previously, and asked him to take a ride to the city. Heimerle dropped Rosenberg off at the Howard Johnson Motel and told him to get a room while he went to 42nd Street to pick up girls to bring to the room. When Rosenberg was turned away at the Howard Johnson's, Heimerle dropped him off at the Ramada In.. Rosenberg came out with the room number and Heimerle asked him to take up the package which Mitchell had given him earlier that evening. Rosenberg took the package and went upstairs. Heimerle looked for some girls by driving around 41st

Street but it was getting late so he kept his meeting with McDonnell first and took him to the Ramada Inn. He called Rosenberg on the house phone and asked him to bring down the package, which he did. Rosenberg handed Heimerle the package, which was sealed. There was no conversation between them (198-204; A 99 - 105).

Heimerle also testified that his counterfeiting conviction included counterfeit \$50 and \$100 Federal Reserve Notes, that his conviction for possessing stolen airline tickets involved mailfraud and that he had also pleaded guilty to a 43 count forgery indictment in New York County and a Grand Larceny charge in Queens County in 1972 (206-209; A 106 - 109).

Heimerle testified further that Mitchell gave him the package to give to McDonnell at 8 P.M. at the Pinchurst Lounge on 183rd Street on the West Side of Manhattan. Mitchell said he could not deliver it himself because of the bad weather. Heimerle agreed to deliver the package and took it back to Brooklyn despite the weather. He went to the telephone booth to receive McDonnell's call and then went back to Manhattan in the snow to deliver the package (220-225; A 110 - 115).

THE DEFENDANT ROSENBERG'S CASE

The defendant Rosenberg rested without offering any witnesses or exhibits (236; A 116).

POINT ONE

THE EVIDENCE ADDUCED AGAINST APPELLANT ROSEN- BERG WAS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH HIS GUILT BEYOND A REASONABLE DOUBT

Approximately 90% of the evidence adduced by the prosecution in the instant case concerned the series of transactions between defendant Heimerle and the undercover agent, McDonnell, on January 28, February 2 and February 5, 1976. Throughout this entire series of events, Agent McDonnell conceded in his testimony, appellant Rosenberg was not present and was never mentioned by Heimerle (41-42; A 24-25). There can be no dispute that Rosenberg's only appearance in this case, according to all the testimony, was when he emerged from the Ramada Inn and handed a "package" or "parcel" containing three inner packages of tightly-wrapped bills (Gov't Exh. 8) to Heimerle through a car window and, according to McDonnell's version, asked Heimerle if he had "gotten the money yet" (29-31; A 17-19). This occurred shortly after Heimerle had gone up to Room 1036 and knocked on the door without receiving a response, and then had called Room 1036 from the lobby and asked someone to "bring the package downstairs" (26-28; A 14-16)*

Interestingly, Heimerle testified that Rosenberg was an innocent drunk who happened to be along for the ride (198, 232; A), an assertion which dovetails with McDonnell's account of the difficulty Heimerle had in rousing Rosenberg from the room.

We submit that, absent the purported question by Rosenberg as to whether Heimerle had "gotten the money yet", the case against Rosenberg was clearly insufficient.

It is clear that mere possession of counterfeit money does not give rise to any inference of guilty knowledge. United States v. Lacey, 459 F. 2d 86 (2nd Cir. 1951); United States v. Forzano, 190 F.2d 687, 688 (2d Cir. 1951).

In United States v. Jimenez-Serrato, 451 F. 2d 523 (5th Cir. 1971), the Court applied the foregoing principle in a case similar to the case at bar in that it involved a large number of bills in a sealed package:

" While from the evidence in this case it is undisputed that the defendant had at the time of his arrest possession of an envelope containing counterfeit bills, this in itself has no probative value insofar as the mens rea required by 18 U. S. C. 472 is concerned. There are none of the indicia of knowledge of the counterfeit nature of the bills as found in other cases where knowledge has been inferred from the surrounding circumstances of the case. [Citing cases]. The defendant here did not possess any counterfeit bills, other than those in the envelope handed to him by the informant." (Id. at p. 525).

We are not unmindful of the oft-cited rule that a jury verdict will be sustained if that view of the evidence most favorable to the Government supports the verdict, Ingram v. United States, 360 U. S. 672, 79 S. Ct. 1314. The evidence in support of the verdict, however, must be

"substantiated". Glasser v. United States, 315 U. S. 60, 80, 80 S. Ct. 457, 469.

We submit that in the instant case, the appellant, Rosenberg's purported question to Heimerle does not raise the evidence of naked possession to "substantial" evidence of guilty knowledge of the contents of the package. It was a remark that could have had an infinite number of esoteric meanings between the parties based upon prior events unknown to this record.

In United States v. Dono, 428, F. 2d 204 (2d Cir. 1970), cert. denied sub nom. Bonaguro v. United States, 400 U. S. 829, 91 S. Ct. 57, this Court held that a lengthy telephone conversation by the defendant which neatly fit the details of an informant's testimony concerning a transaction involving the sale of counterfeit currency, raised a "substantial" question of legal sufficiency. Stated the Court (428 F. 2d at p. 210):

" The telephone conversation, if it stood alone, would be so cryptic that it could not be argued successfully that it would support a conviction."

Similarly, we submit that the appellant Rosenberg's simple, equivocal statement to Heimerle is an insufficient indicia of guilty knowledge.

United States v. Arcuri, 405 F. 2d 691 (2d Cir. 1968), a case upon which the government is likely to rely herei, is quite distinguishable.

In Arcuri, the Court held the evidence sufficient to convict the defendant, Cimei, who had accompanied a codefendant to the scene of the transaction with a paper bag full of counterfeit currency. In Arcuir, however, unlike the case at bar, Cimei appeared in response to a series of telephone calls by another codefendant who had made an arrangement to sell counterfeit to an undercover agent. He then was observed caucusing with his codefendant as the deal was being negotiated, prior to his delivery of the paper bag. He also took the witness stand and gave a version of what went on which the Court stated that the jury could have found "incredible". (Id. at 694-695).

POINT TWO

IT WAS ERROR FOR THE
COURT TO DENY APPELLANT
ROSENBERG'S MOTION FOR A
SEVERANCE

At the conclusion of the Government's case, counsel for Appellant Rosenberg requested a severance, at that point in the following manner:

"Mr. Lopez: I have been informed by Mr. Pollack he intends to offer an entrapment defense as far as his client is concerned. We don't join in the entrapment defense whatsoever. Our issues are quite different and I think the question of identification, the question of knowledge of the package. It is my impression to speak to Mr. Pollack now. The co-defendant will place Mr. Rosenberg in the hotel with the package. It seems it ought to obviate a great portion of the defense and the issue that he intends to raise be an issue of fact.

Under these circumstances and having first been alerted to this matter, I respectfully ask for a severance as far as Rosenberg is concerned.

The Court: Application denied."

While it is recognized that it is within the sound discretion of the Court as to whether or not to grant a severance and such is not reviewable unless such denial was an abuse of discretion it is submitted that the Court in this matter abused its discretion in denying the motion (see Heike v. United States, 227 U.S. 131, 33 S.Ct. 226; United States v. Ball 163 U.S. 662, 16 S.Ct. 1192; Stilson v. United States, 250 U.S. 583;

40 S.Ct. 28; Opper v. United States, 345 U. S. 84, 75 S.Ct. 158).

The evidence that has been presented during the Government's direct case was barely sufficient to make out a prima facie case as is evidenced by the exchange between the Court and the attorneys at the conclusion of the direct case (172-174, A 77-77). The fact that the appellant, Rosenberg's co-defendant was going to testify placing Rosenberg at the scene while raising an inconsistent defense to Rosenberg's required a severance especially since the co-defendant had prior convictions for similar crimes which the jury would be made aware of.

In effect what the co-defendant's testimony accomplished was to make a shambels of the appellant's arguments which would have had greater merit with only the direct case before the jury. In determining whether or not to grant the severance it was incumbent upon the Court to weigh the prejudices as they affected the appellant and the government. Surely, it cannot be argued that the government's case would have been weakened against either defendant if the severance had been granted but it is obvious that the appellant's position was weakened.

In balancing the equities, where there is potential harm to a defendant the Court should do everything within its power to protect his rights; in this case to accomplish this end it would have been proper to grant the requested severance.

POINT THREE

APPELLANT ROSENBERG ADOPTS
THE POINTS RAISED BY APPELLANT
HEIMERLE INSOFAR AS THEY ARE
APPLICABLE

CONCLUSION

THE CONVICTION SHOULD BE RE-
VERSED AND THE INDICTMENT
DISMISSED, OR A NEW TRIAL
ORDERED

Respectfully submitted,

EVSEROFF & SONENSHINE,
Attorneys for Appellant.

WILLIAM SONENSHINE, ESQ.
Of Counsel

COPY RECEIVED
ROBERT B. FISKE JR.
AUG 16 1978
U. S. ATTORNEY
SO. DIST. OF N. Y.